

Title IX Regulations: Training for Implementation

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krihaboucek.com



[@krihabouceklaw](https://twitter.com/krihabouceklaw)

Oakbrook Terrace Office

2 Trans Am Plaza Dr., Suite 450
Oakbrook Terrace, IL 60181

Southern Illinois Office

3 Club Centre Court Suite D
Edwardsville, IL 62025

*“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”*

20 U.S.C. §1681(a)

The Evolution of Title IX

2020 Bostock v. Clayton County, Georgia: Title VII prohibits any discrimination because of sex, even discrimination based on homosexuality or transgender status

2020 Trump Era Title IX regulations take effect, focus extensively on process and due process, including requirements for formal complaint, siloed investigation and decision making process

2021 The Biden Administration issues guidance in interpreting the Trump era regulations, attempts to expand regulatory reach, and initiates revisions to the regulations

2024 The Biden Era Title IX regulations take effect, revoking prescribed process requirement, redefining sex harassment, and adding regulatory protections for LGBTQ+ individuals

Who are the parties involved?

- **Complainant**: an individual who is alleged to be the victim of conduct that could constitute a Title IX violation
- **Respondent**: an individual who has been reported to be the perpetrator of conduct that could constitute a Title IX violation
- **Title IX Coordinator**: schools must designate a Title IX Coordinator to coordinate all the school's efforts to comply with the Title IX regulations
- **Investigator**: individual who investigates allegations of Title IX misconduct in a formal complaint and creates an investigative report
- **Decision-Maker**: individual who makes a determination of responsibility based on the investigation report, evidence and statements resulting from a formal complaint; *cannot* be the same person(s) as the Title IX Coordinator or Investigator
- **Appeal Decision-Maker (internal appeal)**: individual (or board) who reviews the appeal of any determination of responsibility; *cannot* be the same person as the Title IX Coordinator, Investigator or Decision-Maker



What is “Sexual Harassment” under Title IX?

1. **Quid pro quo offer based on sex:** employee (not student) offers some kind of aid-benefit-service in exchange for unwelcome sexual conduct
2. **Violence based on sex:** sexual assault, dating violence, domestic violence and/or stalking, as defined in the *Clery Act* and the *Violence Against Women Act* (VAWA)
3. **Sexual harassment:**
 - Unwelcome sexual conduct (or conduct based on sex)
 - So severe AND pervasive AND objectively offensive
 - That it effectively denies a person equal access to educational programs or activities

Example Scenarios:

Example 1:

A fifth grader tells her teacher that a student in her class is trying to touch her chest and her private areas, and saying things to her like “I want to get in bed with you” and “I want to feel your boobs.” The student says the classmate also put a door stop in his pants and tried to rub up against her in the hallway. This kind of behavior occurred nearly every day over several months. The student tells her teacher this is why her grades have dropped, that she is always nervous and anxious in school now. The girl’s mother also met several times with the principal to discuss the behavior.

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?

Davis v. Monroe County Board of Education

526 U.S. 629 (1999)



DECISION:

School Districts that are deliberately indifferent to peer on peer sexual harassment may be held liable for money damages for their deliberate indifference.

To avoid deliberate indifference, School Districts must respond in a way that is not clearly unreasonable in light of the known circumstances.

The Court is specific that this does not require School Districts to discipline every student accused of sexual harassment.

Example 3:

A female high school student is the only female student on the school's wrestling team. Over the course of about three years that the student was on the wrestling team, the (male) coach made the following comments:

- When the female student was wrestling with a male student, the coach said to him, "How does it feel knowing that's probably one of the only women you'll ever have on top of you?" Another time, while the same two students were wrestling, the coach said to the male student, "she'll be the only girl you'll touch."
- To the female student directly, the coach said, "You'll have to be a 'boy' on the team," at least twice. He also said that she would have to have "strap-ons" [referring to prosthetic penises] at least four times.
- The coach asked the student if she was having her menstrual cycle during a wrestling match, because he could see her "pad" through her singlet, and then laughed about it with another coach.

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?

Title IX vs. Illinois Sexual Harassment

- Illinois: "***Sexual Harassment***" is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.
- Title IX: "***Title IX Sexual Harassment***" is defined as Conduct on the basis of sex that satisfies one or more of the following: (1) A District employee conditions the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity; or; (3) *Sexual assault, dating violence, domestic violence, or stalking*
-



Where Does Title IX Apply?

“Educational Programs or Activities”: includes—

- **Locations, events, or circumstances** over which the school exercised *substantial control* over both the *respondent* AND the *context* in which the sexual harassment occurs; and
- Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

“Against a person in the United States”:

- Sexual harassment that occurs abroad does not fall within the purview of Title IX and its implementing Regulations.
- BUT schools can choose to respond to sexual misconduct that occurs abroad via alternative means in Student/Employee Codes of Conduct.

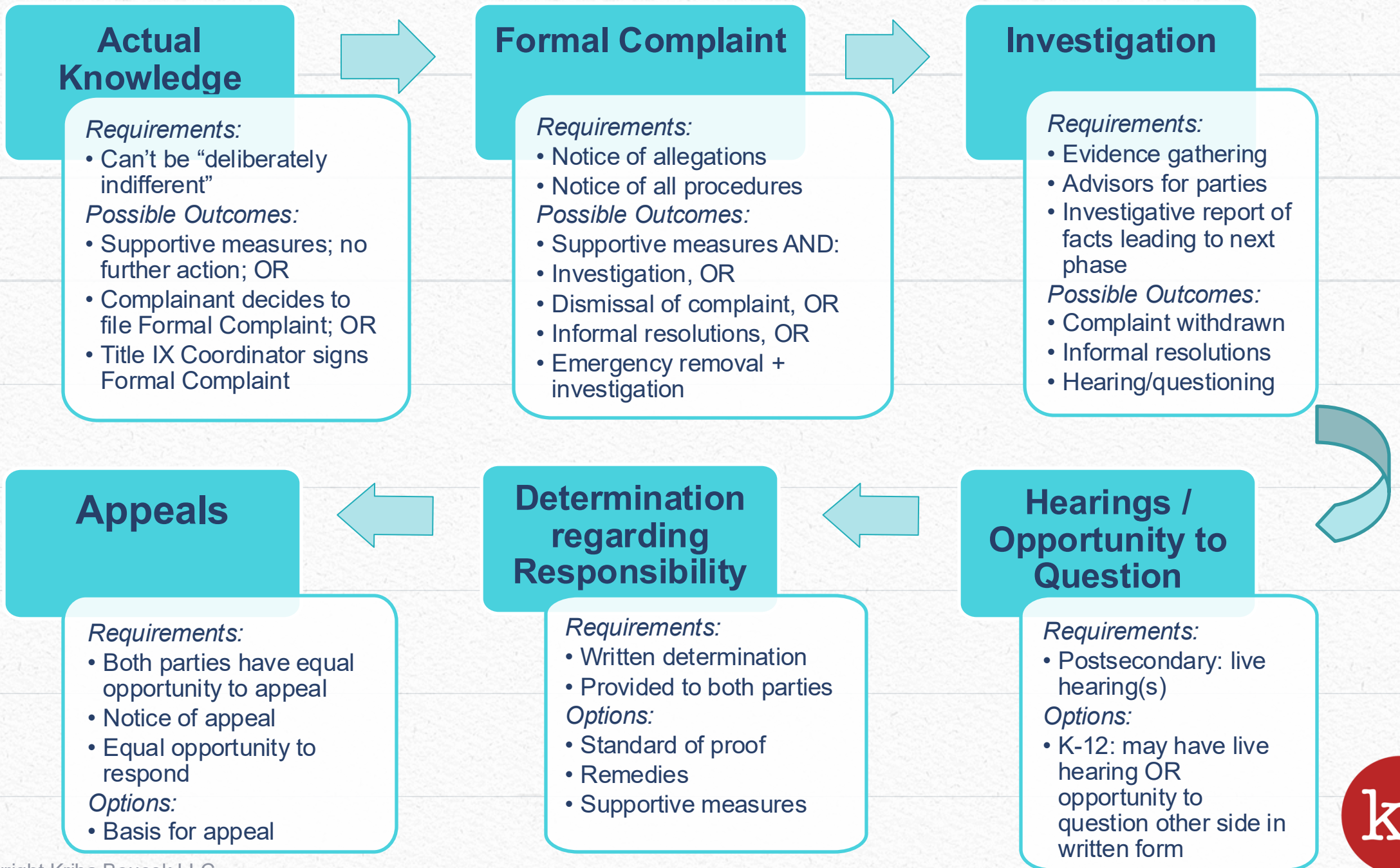
Complainant: At the time of filing a Title IX complaint, the Complainant must be participating in or attempting to participate in the school’s educational program or activities.

Examples – *Where?*

- During class or in the hallways?
- On the bus?
- On a field trip to the Zoo?
- At an extra-curricular event? (home v. away event ...?)
- At a student's home?
- On a Spanish Immersion Trip in Mexico?

Applying the Title IX Grievance Procedures





Phase 1: Actual Knowledge

- Title IX applies when school personnel have actual knowledge either informally through a verbal or written report (including anonymous reports) of sexual harassment or allegations of misconduct based on sex.
- In K-12 school systems, “any employee” can have actual knowledge.

Phase 2: Formal Complaint

Requirements of Formal Complaint:

- A document (electronic or physical)
- Alleging sexual harassment, and
- Requesting an investigation

EITHER:

- Filed by a Complainant and signed by this individual [may not be anonymous]
 - OR
- Signed by Title IX Coordinator. (see next slide)

Procedure for filing a Formal Complaint must be included in the school's Title IX policies that are "prominently displayed" on website and/or in Student and Employee Handbooks, along with Title IX Coordinator's contact information. Form may be provided via web portal.

Formal Complaint Signed by School Staff

There are some circumstances under which the school district's Title IX coordinator "signs" a formal complaint instead of the complainant

When would this be necessary?

- X If the complainant is not willing or eligible (e.g., has graduated)
- X A potential safety risk continues for other students/employees
- X A staff member is accused of committing sexual misconduct against a student

Examples:

- X The school has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- X The school wishes to investigate allegations in order to determine whether it has probable cause to find that an employee is engaging in sexual misconduct
- X A Title IX coordinator receives multiple reports of sexual harassment against the same respondent

Phase 2: Formal Complaint

- Formal Complaint triggers several possible responses:



Formal Title IX Complaint – The Initial Response

- School personnel must respond *promptly* and in a manner that is *not deliberately indifferent*.
- Must treat complainants and respondents *equitably*
- Must offer *supportive measures* to both complainants and respondents

Promptly: without unnecessary delay under the circumstances

Deliberately indifferent: clearly unreasonable in light of known circumstances

Equitably: equal, fair and impartial

Supportive measures: non-punitive individualized services offered free of charge as appropriate in order to restore equal access.

Informal Resolution is (Sometimes) an Option

- After a formal complaint is filed, the parties may agree to engage in informal resolution of the complaint
- Requirements for informal resolution:
 - ✗ Can never be compelled; parties must mutually agree
 - ✗ May be facilitated at any time before a determination regarding responsibility is reached
 - ✗ Parties must provide written consent to participate in the informal resolution process
 - ✗ Before conclusion of the informal resolution process, either party has the right to withdraw their consent and return to the grievance/complaint procedure
- Keep in mind that school districts are not allowed to use informal resolution for allegations of an employee's sexual misconduct against a student

Supportive Measures:

- Counseling
- Extension of deadline
- Modification of work/class schedules
- Campus escort services
- Mutual restrictions on contact
- Changes in housing/ work locations
- Leaves of absence
- Increased security

34 CFR §§ 106.30(a), 106.44(b)

Impartiality (slide #1)

- We all have biases, whether conscious or unconscious
 - X <https://implicit.harvard.edu/implicit/>
 - X <https://trustandjustice.org/resources/intervention/implicit-bias>
- Resist the urge to categorize people or situations
- Reflect critically on your own identity and experience
- Recognize when your identity and experience may affect your judgment
- Hold yourself accountable and seek opportunities for continuous improvement



Impartiality (slide #2)

- Being impartial means setting aside preconceived beliefs and the urge to judge.
- Being impartial means listening equally to all sides and perspectives and focusing on understanding the viewpoints of all involved.
 - X Listening impartially to others takes **time**
 - X Listening impartially requires **awareness** of one's own biases
 - X Listening impartially means **asking questions that open up dialogue**, rather than close it down
- Strategies for demonstrating impartiality include summarizing what you have heard and reflecting back. This can help you avoid bias and ensure that you are correctly understanding what the person has to say.
- Acknowledge where differences between accounts/perspectives exist; rather than seek to smooth over differences (which is human nature), seek more details.
- Take care that your words, tone of voice and body language are neutral and open.



Actual Knowledge

Requirements:

- Can't be "deliberately indifferent"

Possible Outcomes:

- Supportive measures; no further action; OR
- Complainant decides to file Formal Complaint; OR
- Title IX Coordinator signs Formal Complaint

Formal Complaint

Requirements:

- Notice of allegations
- Notice of all procedures

Possible Outcomes:

- Supportive measures AND:
- Investigation, OR
- Dismissal of complaint, OR
- Informal resolutions, OR
- Emergency removal + investigation

Investigation

Requirements:

- Evidence gathering
- Advisors for parties
- Investigative report of facts leading to next phase

Possible Outcomes:

- Complaint withdrawn
- Informal resolutions
- Hearing/questioning

Appeals

Requirements:

- Both parties have equal opportunity to appeal
- Notice of appeal
- Equal opportunity to respond

Options:

- Basis for appeal

Determination regarding Responsibility

Requirements:

- Written determination
- Provided to both parties

Options:

- Standard of proof
- Remedies
- Supportive measures

Hearings / Opportunity to Question

Requirements:

- Postsecondary: live hearing(s)

Options:

- K-12: may have live hearing OR opportunity to question other side in written form

Phase 3: Investigations — An Overview

- Burden is on the school (not the parties) to gather evidence
- Evidence that is legally privileged may not be used; parties can opt to waive this privilege
- Equal opportunity for parties to present witnesses
 - Fact witnesses
 - Expert witnesses
- School is not able to restrict either party from discussing allegations or to gathering evidence
- Parties have an equal opportunity to select 'advisors' of their choice (may be attorney) at their own expense
- School staff must provide notice to all parties of hearings, interviews and meetings to allow time to prepare
- Equal opportunity for parties to inspect/review all evidence to ensure that each party can respond in a thoughtful and meaningful way
 - Must send all evidence to parties before final report created
 - Must allow at least 10 days to respond

Phase 3: Investigations — Tips and Strategies

- Plan investigation scope and timeline
- Identify and interview all involved parties and witnesses
 - X Interview the complainant and the respondent (separately) about what happened; additional interviews may be needed as evidence is uncovered
 - X Ask open-ended questions about the incident(s) in the complaint
 - Pre-script standardized, open-ended questions
 - Use neutral language
 - Allow time for follow-up questions
 - Refrain from using judgmental or projecting language
 - X Ask each person for the names of potential witnesses for additional interviews
 - X Understand and implement trauma-informed interviews

Investigations — Unique to Title IX



- Once compiled, **send all evidence to complainant** and respondent (and their advisors) with plenty of time (at least 10 days) to meaningfully respond
- Consider the Parties' responses when drafting the investigative report
- **Refrain at this step from determining the credibility** of the parties or their statements, but document details that *do* and/or *do not* align with other parties' accounts and other relevant evidence



Corey's Law and Student Interviews

- Corey's Law requires notice to parents before a student is interviewed by law enforcement, an SRO, or school security personnel
- Must make reasonable efforts to allow parents to be present during the interview if held on school grounds
- 105 ILCS 5/22-85

Allow Other Investigations to Run Their Course





Interviews by the Child Advocacy Center (CAC)

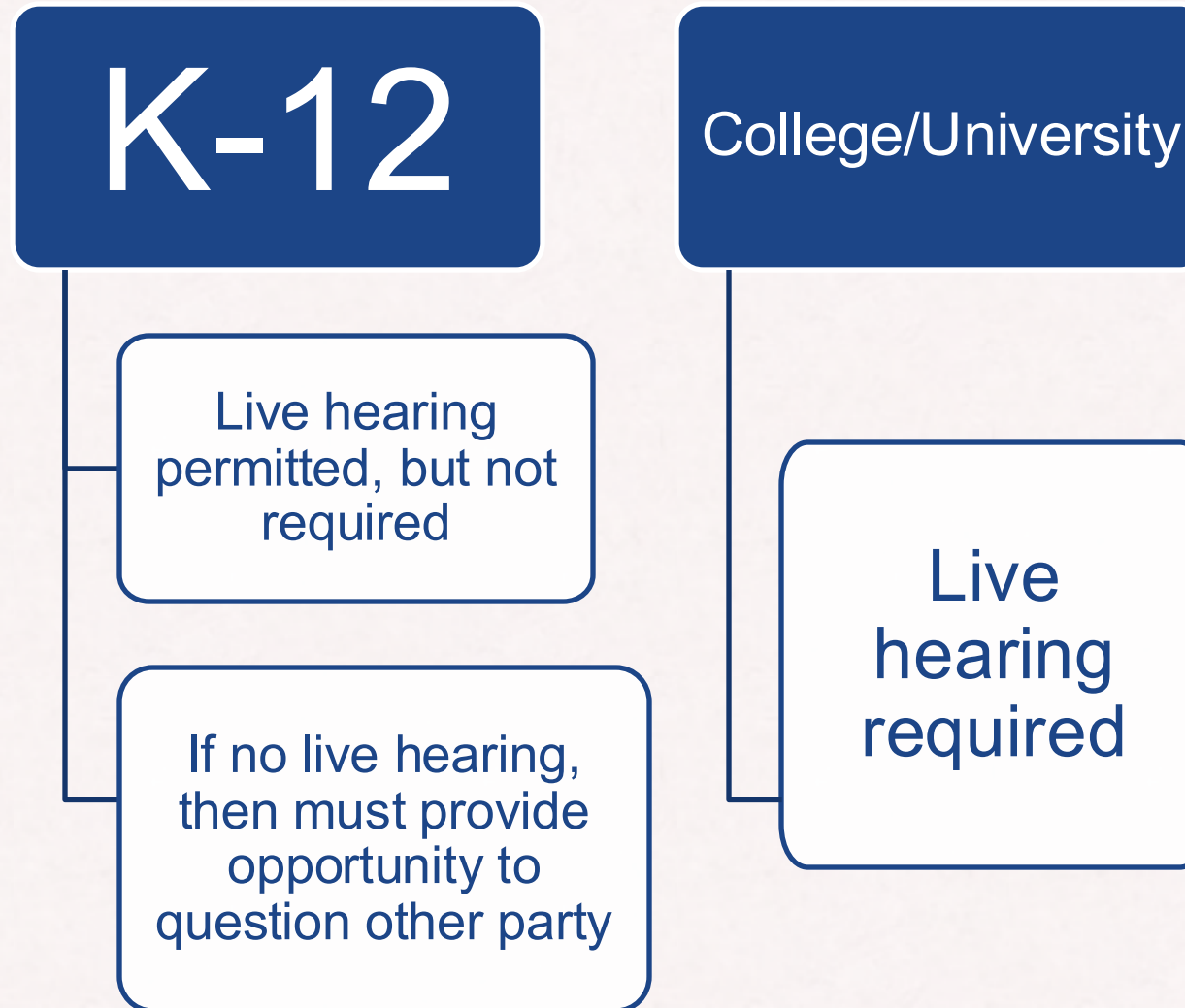
- Law intended to reduce re-trauma of kids involved in misconduct.
- “The **recording** of a forensic interview may be provided to school districts in relation to an administrative hearing (teacher dismissal, student expulsion, etc.) **to limit re-traumatization of the child victim.**”
- 55 ILCS 80/4.5

Phase 3: Investigation — The Investigative Report

- The investigator prepares a final written investigation report that fairly summarizes all the relevant evidence, without making a determination of responsibility or deciding 'fault'
- The investigator does not determine the credibility of parties, witnesses or evidence
- The investigator gathers all relevant evidence and turns everything over to the decision-maker to weigh credibility and make a decision (this happens during the next phase)
- The final written investigation report must be sent to each party
- Keep in mind that the complainant has the right to withdraw the complaint at any time
- The parties may also mutually agree to participate in the informal resolution process at any time



Phase 4: Exchange of Questions / Hearing



Phase 4: Hearing (optional)

- Presided over by Decision-maker [individual or group]
- Must be **direct, oral, live** questioning of parties and witnesses, including cross-examination
 - May be facilitated by technology, as long as simultaneous
 - Parties may not directly ask questions; only **advisors** for parties
 - **Advisors** for parties must be able to ask opposing party and witnesses all relevant questions
 - If a party does not have an **advisor**, school must appoint one
- If a party/witness will not submit to cross-examination, then Decision-maker **cannot use any** statements or evidence from that person in making decision
- Hearing must be recorded (audio or film or transcript), and made available to all parties for inspection and review after hearing

Phase 4:

Opportunity to Question*

For K-12 schools only, and only if there is no live hearing, then must provide an opportunity for each side to ask each other written questions:

- After investigative report sent to each party, each party must have the opportunity to submit written, relevant questions that it wants from any other involved party or witness
- School must facilitate written back-and-forth:
 - Must provide the answers to all the questions requested
 - Must allow for additional, limited follow-up questions from each party
- Same rules about relevance as in previous slide

Phase 4: Opportunity to Question – Relevancy of Questions

- Parties may only be asked relevant questions
 - Does it tend to make a fact more or less probable than without that information?
 - Is it likely to prove or disprove a fact or an allegation?
- Same standard for live hearing and for written opportunity to question
- Decision-maker must determine relevance of questions as they are asked, and before they are answered

Phase 4:

Opportunity to Question - Relevancy of Questions

Questions and Their Relevance

- Parties may only be asked *relevant* questions
 - X *Legally privileged information cannot be used*
 - X *No party's treatment records can be used without voluntary written consent*
 - X *Questions about complainant's "prior sexual behavior or predisposition" are NOT relevant and must be excluded, UNLESS offered either 1) to prove someone else committed the alleged conduct, or 2) to prove consent, because it has to do with sexual behavior between complainant and respondent**
 - X **Prior consent to past sexual conduct does not imply future consent*
- Decision-maker must determine relevance of questions *as they are asked*, and *before* they are answered

Decision-maker reviews investigative report, all evidence, all statements/answers from parties and witnesses during any live hearings or opportunity to question.

Decision-maker weighs the credibility of all relevant evidence and statements.

Next phase: Determination regarding Responsibility. . .

Standard of Review

The decision-maker applies the school district's chosen standard of evidence for Title IX investigations:

- **Option 1:** “preponderance of the evidence” standard
- **Option 2:** “clear and convincing” standard

Each school district must choose one of these standards for ALL sexual harassment investigations (those involving just students, just employees, and both students and employees)

Phase 5: The Written Decision

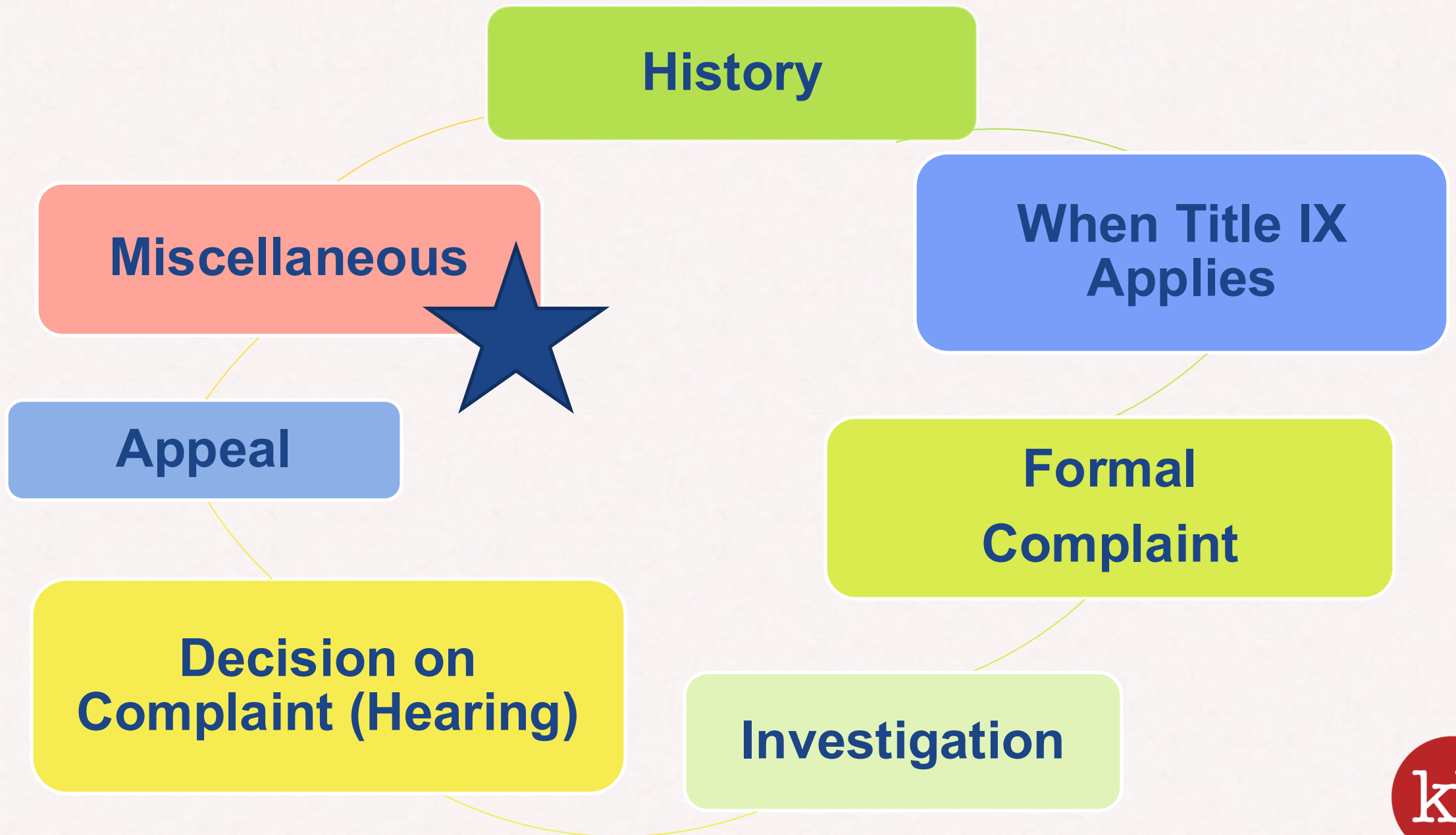
- The decision-maker issues a written determination regarding responsibility that includes:
 - Identification of allegations of sexual harassment that meet Title IX definition
 - Description of all procedural steps
 - Findings of fact supporting the determination
 - Conclusions regarding application of school's disciplinary code to the facts
 - Rationale for the decision regarding *each* allegation and determination regarding responsibility
 - Any disciplinary sanctions imposed upon a party
 - Any other remedies and supportive measures recommended or warranted
 - Procedures and permissible bases for appeal
- School must provide written determination to parties simultaneously
- Title IX Coordinator implements remedies / coordinates disciplinary consequences

Phase 6: Appeals

- Parties can appeal either:
 - The determination of responsibility, OR
 - School's decision to dismiss complaint
- Bases for appeal:
 - Procedural irregularity that *affected the outcome*
 - New evidence not reasonably available previously that *could affect outcome*
 - That Title IX Coordinator OR Investigator(s) OR Decision-maker(s) had a bias or conflict of interest that *affected the outcome*
 - Generally, either for or against complainants or respondents, OR
 - Specifically, either for or against an involved party
 - Another basis for appeal allowed by the school, as long as it is equally available to either party

Phase 6: Appeals

- School must do following for an appeal:
 - Notify the other party in writing when an appeal is filed and on what basis
 - Implement appeals procedure equitably
 - The appeals decision-maker must not have been involved in the Title IX complaint process thus far
 - The appeal decision-maker must be trained and is neutral/impartial
 - Give both parties a reasonable, equal opportunity to submit a written statement about the outcome of the investigation phase
 - Issue a written decision describing the result (final decision) and rationale
 - Provide decision simultaneously to all parties
- Can a Title IX matter be appealed any farther? Presumably yes, in a court of local jurisdiction and potentially also to OCR



Recordkeeping

The Title IX Coordinator must keep written records for 7 years of all of the following:

- Title IX complaints, including:
 - Supportive measures provided
 - If no supportive measures provided, document why not warranted
 - Basis for school's conclusion that its response was not deliberately indifferent
 - Documentation of measures designed to restore or preserve equal access for the complainant
- Investigation reports and records
- Recordings/transcripts of hearings (if any)
- Written determinations regarding responsibility
- Disciplinary consequences (if any)
- Appeals
- Informal Resolutions



Training

All training materials used to train

- Title IX coordinator
- Investigator(s)
- Decision-maker(s)
- Appeals decision-maker(s)

Training must include:

- Title IX regulations
- How to use technology
- How to avoid prejudgment
- How to serve impartially
- How to determine issues of relevance of questions or evidence

Training materials must be kept for seven years AND posted publicly to school's website for public review

Retaliation is Prohibited

- Retaliation is prohibited against anyone involved in a Title IX complaint, investigation, or grievance procedure
- The exercise of rights protected under the First Amendment does not constitute retaliation that is prohibited
- School can charge someone with a disciplinary violation for making a “materially false statement in bad faith” during grievance proceeding



School Board Policy Integration

Policy Revisions to Align with Title IX Regulations

- Section 2:260 – Uniform Grievance Procedure
- Section 2:265 – Title IX Policy
- Section 7:10 – Equal Educational Opportunities
- Section 7:20 – Harassment of Students Prohibited
- Section 7:180 – Bullying



Questions?

REMEMBER
WHY YOU
STARTED



Elizabeth Kelly

elizabeth@krihaboucek.com



kriha boucek

Thank you!



krihaboucek.com



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